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Nos. 98-1026, 98-1028, 98-1039, 98-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON, *Petitioner*,

- and -

PUGET SOUND SHELLFISH GROWERS, *Petitioners*,

- and -

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"), *Petitioners*,

- and -

LARRY B. AND SHIRLEE ALEXANDER, *et al.* and WILLIAM AND CHARMOND ADKINS, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *et al.*, *Respondents*.

On Petitions For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT INDIAN TRIBES' BRIEF IN OPPOSITION

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ABBREVIATIONS

CR	Clerk's Record (District Court Docket Number)
ER	Excerpt of Record (Prepared for Court of Appeals)
SER	Supplemental Excerpt of Record (Prepared for Court of Appeals)
PL-	Plaintiffs' Exhibit
D-	Defendants' Exhibit

INTRODUCTION

The four petitions for certiorari present ten questions, none of which implicates a conflict in authority among the Courts of Appeals or with a State Supreme Court. A number of questions rest on incorrect premises, and a number would require this Court to engage in the heavily factbound examination of the record already conducted by the courts below. In all instances, petitioners press arguments that mark a clear departure from the plain treaty language and this Court's precedents. The petitions should be denied.

The courts below held that, in entering into five nearly identical treaties with the tribes of western Washington (the Stevens treaties), the United States made a promise that the tribes would enjoy a permanent, meaningful right to take shellfish from natural shellfish beds and that this promise should be honored today. Under the treaties, (1) "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens," (the fishing right); (2) "*Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens" (the shellfish proviso). Treaty of Medicine Creek, Art. III, 10 Stat. 1132, 1133 (1854).

The majority of petitioners' questions concern the scope of the fishing right. Certiorari on those questions is unwarranted because in seven previous decisions this Court already has explored the meaning of that right and the courts below fully adhered to those decisions. There is no conflict with any other court.

This Court has not considered the shellfish proviso previously, but review of its meaning is unwarranted for two reasons: first, because there exist no other treaties containing language about shellfish beds, and the interpretation of the proviso therefore does not implicate any broader concerns; and, second, because the courts below reached their conclusion as to its meaning based on a careful, factbound examination of the type that this Court typically will not revisit. Petitioners also complain about the standard of review utilized by the Court of Appeals in addressing the proviso's meaning, but their claims of conflict or error on this point do not withstand scrutiny.

Finally, the dire harm claimed by petitioners from the decisions below is demonstrably overstated and unquestionably irrelevant to the treaties' interpretation. Because the Court of Appeals' decision is consistent with the previous opinions of this Court, and because no conflict exists with the decisions of any other court, the petitions should be denied.

STATEMENT OF THE CASE

I. Factual Background

From time immemorial, the Indian people of western Washington have been a fishing people, "us[ing] and rel[ying] on fish, including shellfish, for subsistence, ceremonial and commercial purposes." App. 69; *see also* App. 10. The uncontested archaeological and anthropological record demonstrates "widespread and sustained use of shellfish resources [by the tribes] for the last ca. 3,000 years," PL-587 at 41, with over a thousand archaeological sites evidencing continuous use by the tribes of at least 114 species of shellfish. SER 1026-27. At the time of the treaties, the tribes "engaged in extensive shellfishing." ER 54. Using the same seaworthy canoes they used for other fishing purposes, they took shellfish from deep water, and they also took large quantities of intertidal clams and oysters. Long lengths of kelp line joined together, for example, yielded sea urchins from deep water "in great quantity." SER 281-82; SER 695.[1] "Shellfish formed a staple in [the tribes'] diet," ER 55 (quoting *United States v. Aam*, 887 F.2d 190, 195 (CA9 1989)), and they were used for religious and cultural reasons, in trade with Indians and non-Indians, as tools and medicine, and for myriad other purposes. SER 1033-34, 696-97.[2]

The tribes' extensive reliance on shellfish was no mystery to the United States' treaty negotiators. App. 10. Underscoring the great commercial importance of shellfish to the Indians, Isaac Stevens, the Governor of the

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[1] The State's claim that tribes "did not venture into deep water to take shellfish" is thus inconsistent with the record. State Pet. at 2, 5.

[2] Petitioners' concerted efforts to minimize the importance of shellfish to the tribes cannot be squared with these findings, which the Ninth Circuit described as supported by "extensive persuasive evidence." App. 10.

Washington Territory, reported in 1854 that the Indians "catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, (Fishing Vessel)* 443 U.S. 658, 666 n.8 (1979) (quotation omitted); ER 55. George Gibbs, the principal treaty draftsman, likewise recorded in his diaries that the Indians took a "great variety" of shellfish, and that "many of these [were] dried for winter stores." *Id.*

In 1854 and 1855, the United States and respondent tribes entered into the treaties at issue here. The United States sought to extinguish the Indians' title to land, while at the same time protecting the Indians' access to the fisheries on which it knew their survival and way of life to depend. App. 11. Prior to the negotiations, Governor Stevens expressed concern that settlers taking up Donation Act land claims had attempted to bar Indian access to fishing grounds. "The subject of the right of fisheries is one upon which legislation is demanded," Stevens wrote. *Fishing Vessel*, 443 U.S. at 666 n.9 (quotation omitted) "It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries." *Id.* (quotation omitted); PL-160, ch. 1 at 16.[3]

For their part, the Indians stated repeatedly during the negotiations that while they would cede millions of acres of territory, they had to retain meaningful access to the fisheries that were their lifeblood. As the district court observed, "it is clear from the treaty minutes that . . . the guarantee of fishing rights was a *sine qua non* of the Indians' participation in the Treaties. The Indians repeatedly raised concerns that they would not survive if they did not have access to their ancient fisheries." App. 67. The negotiation sessions thus

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[3] Settlers' claims under the Donation Act were to upland areas. The Alexander petitioners' contention that large areas of tidelands were covered by development at treaty times is incorrect. Pet. at 3. Although there were some mills and other developments on the tidelands, they covered a miniscule portion of the thousands of miles of shoreline. 1994 Tr. at 1707, 1713-14. Given that they knew that abundant shellfish were taken even in the vicinity of populous cities like New York and Boston, the treaty commissioners had no reason to believe that the nascent tideland development in the Puget Sound posed any threat to the Indians' use of the "inexhaustible" shellfish resource. App. 72; SER 128-30.

reaffirmed the American commissioners' conviction that the treaties had to preserve for the tribes their ability to continue their fishing way of life. Not only did the United States' negotiators recognize that the "Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States," App. 11, but they also saw such a guarantee as ensuring against Indian dependence on the United States for support, a result they explicitly had been told to avoid. App. 69; ER 699.

Accordingly, Governor Stevens promised the Indians that under the treaties they would enjoy a permanent, meaningful right to continue their fishing way of life:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished. There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

App. 27 (quoting App. 67). Stevens declared that "[t]his paper secures your fish," *Fishing Vessel*, 443 U.S. at 667 n.11 (quotation omitted), and there is no suggestion in the treaty records that the United States intended, or the Indians understood, the shellfisheries to be excluded from this fundamental promise. App. 67-68. As the district court put it, the Indians did not "believe[] that their need for shellfish would diminish over time," App. 70, but instead believed themselves to be "bargaining for a permanent right." *Id.*

The United States negotiators also sought to protect the non-Indian "shellfish-cultivation industry [that] had begun to develop at Shoalwater Bay in the Washington Territory" and that was "modeled after the larger, older, and more developed shellfish industry on the east coast." App. 11, 64-65. This industry was based on the creation of shellfish beds for storage or growth purposes where natural beds of that shellfish type did not exist. As the district court found and

the Court of Appeals affirmed, these man-made beds were commonly referred to as "staked" or "cultivated" beds:

> Shellfish farmers created "cultivated" beds (ones on which shellfish spawn would not naturally set) by removing oysters from their natural beds to areas where they could grow more rapidly, or by placing shells or other material to harden the bottom and thereby facilitate the setting of the oysters. In addition to creating cultivated beds, shellfish farmers frequently "staked" beds of shellfish by storing market-sized shellfish removed from other beds until they could be shipped to market. These staked beds did not naturally contain shellfish of the type being stored, and their boundaries were marked for identification purposes with stakes extending above the surface of the water at high tide.

App. 11.

While exclusive rights to staked or cultivated beds could be created, the public at treaty times vigorously insisted on its right of access to natural shellfish beds, and that right was consistently upheld in court decisions and by statute.[4] Newspaper and magazine articles, industry treatises, letters and journals written by commercial fishermen and, most importantly, the writings of the treaty commissioners themselves, consistently drew the same distinction between staked or cultivated and natural shellfish beds. As the courts below concluded, then, in prohibiting tribal shellfishing from "beds staked or cultivated by citizens," the treaty negotiators provided protection for the artificial beds that formed the foundation of the growing shellfish industry in the Washington Territory, while remaining faithful to their promise that the tribes would retain a permanent right of access to their fisheries, including the natural shellfish beds.[5]

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[4] The growers are incorrect in claiming that the law was not uniform. Growers' Pet. at 5, 8. Before the treaties only Rhode Island had even briefly allowed the staking or cultivating of a natural shellfish bed, but it rescinded that provision before the treaties. PL-160, ch. 2 at 40-41.

[5] Petitioners repeatedly claim that the proviso interpretation set forth by the courts below rests solely on a technical interpretation of "east coast" law. State Pet. at 10, 28; Grower Pet. at 5, 8; Alexander Pet. at 11, 20,

The promise was kept for many decades. In the first two decades after the treaties the Territorial legislature passed general statutes regulating the taking of shellfish on four occasions. SER 870-72. Each of those statutes provided legal protection for creators of artificial shellfish beds while maintaining the public's right to take shellfish from natural beds. After Washington's admission to the Union in 1889 it passed statutes permitting the sale of tidelands. App. 12. However, even after more than a decade of private ownership, the State continued to recognize that the public generally, and treaty Indians in particular, could take shellfish from natural beds on those tidelands. PL-160, ch. 4 at 39-43; SER 898-900. It was not until more than fifty years after the treaties that the Washington Supreme Court held, without any specific consideration of treaty rights, that a lessee of tidelands could exclude the general public from natural beds. *Sequim Bay Canning Co. v. Bugge*, 94 P. 922 (Wash. 1908). In the years following, the State sold off the "vast majority" of its tidelands, App. 73,[6] and the tribes who had been promised permanent rights to their fisheries saw

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25. Mere repetition cannot make this so. To the contrary, the "district court 'interpret[ed] the terms 'staked' and 'cultivated' as the terms were defined and used in the shellfishing industry at and before treaty time.'" App. 26 (quoting App. 77). The "compelling and persuasive" evidence, App. 55, the court canvassed regarding the proviso's meaning included not simply the legal framework of the time, but also "evidence of actual shellfish industry practices" on the east coast *and* in the Washington Territory, App. 61, including industry treatises, newspaper articles, and *the writings of George Gibbs, the principal treaty drafter*. App. 60-66.

The State would also have this Court believe that the district court simply "assumed" that the treaty negotiators were familiar with the shellfishing industry and its terminology. State Pet. 10, 28. However, the district court found the evidence that the United States' negotiators were familiar with the shellfish industry (on both coasts) and drew the terms of the proviso from it to be "compelling" and "overwhelming[]," App. 55, 59, 78, and likewise found that the Indians were familiar with the practices at Shoalwater Bay, App. 65-66. These findings are unassailable. Indeed, *petitioners' own expert* conceded that the treaty negotiators "borrow[ed] from the oystermen's terminology" to draft the proviso, D-467 at 108.

[6] Despite this clear finding of fact by the district court, petitioners continue to assert that only about half of the tidelands have been sold. *See, e.g.*, State Pet. at 3, Alexander Pet. at 2.

their ability to take shellfish deteriorate as the State enforced trespass laws against tribal harvest. PL-160, ch. 4. By the time of this subproceeding, the tribes' harvest of shellfish had been reduced to a negligible percentage of the non-Indian harvest. SER 971. And the effect of the broken promise is clear. As the district court found and the Court of Appeals affirmed, "[t]he uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living." App. 33.

The shellfish and other fish resources have themselves changed radically since the time of the treaties. Native oyster populations have diminished by 99%, and have been replaced by the exotic pacific oyster. SER 1004-05. Native littleneck clams have also been largely supplanted by the introduced manila clam. App. 12. The native geoduck clams that were once available in commercial quantities on the intertidal beaches of Puget Sound are now found almost exclusively in deep water as a result of non-Indian overharvest in the shallow areas. SER 992.

As the treaty negotiators intended, the commercial shellfish industry in Washington has prospered. Today the pacific oyster is the dominant species cultivated in Washington, accounting for about 60% of the annual harvest value. PL-988, Tbl. 50. Because pacific oysters do not reproduce naturally except in some areas of Hood Canal, virtually all pacific oyster beds are "artificial" under the interpretation of the shellfish proviso consistently advocated by the tribes and adopted by the courts below, and are thus off-limits to tribal harvest. In recent years, numerous artificial beds of manila clams have also been created by the growers through seeding or alteration of the substrate, and the tribes have again disclaimed any rights to those beds. PL-535, vol. 1, ch. 6 at 13.

II. Course of Proceedings

In 1970 the United States sued Washington to implement the fishing rights of several Indian tribes. The district court held, and this Court ultimately affirmed, that the tribes have a right to take up to half of the anadromous fish found in their fishing areas. *Fishing Vessel*, 443 U.S. at 671, 685-87.

The district court retained jurisdiction to adjudicate the tribes' rights to other fish species.

The shellfish subproceeding began in 1989. ER 9. By pretrial motion, the district court held that under the plain language of the treaties, and the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), the "right of taking fish" includes the right to take shellfish. App. 56.[7] The court then held an exhaustive three-week bench trial, after which it issued an opinion holding that the tribes' rights of taking shellfish are co-extensive with their rights to other fish, except to the extent limited by the shellfish proviso. App. 52-53. The court concluded, based on evidence it considered "compelling," App. 55, 59, and "overwhelming[]" App. 78, that the proviso limits tribes from taking shellfish only from those artificial shellfish beds created by citizens where no natural bed of that species exists.[8] App. 77.

The district court then issued two orders imposing stringent limitations on tribal shellfishing in order to protect the interests of private landowners. The court held that the tribes may harvest shellfish from private tidelands – even for subsistence purposes – only five days a year (with some increase on larger lots), and only after providing landowners with one-month's notice and conducting (at their own expense) scientific surveys establishing the presence of natural shellfish populations. App. 126-27. The court also prohibited tribal access across privately owned uplands to reach shellfishing areas unless "[t]ribal members can demonstrate the absence of access by boat, public road, or public right of way." App. 146. All parties appealed.

The Court of Appeals, in an opinion by Judge Trott, affirmed the district court's interpretation of the treaties. The court also affirmed the stringent limitations placed on

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[7] No petitioner challenged this holding in the Court of Appeals, and none challenges it here.

[8] The court did not say that a cultivated area could "never" have supported a natural bed. State Pet. at 10. Under the court's opinion, for example, an artificial bed of pacific oysters can be created on a site where the native oyster existed long ago.

tribal shellfishing from private tidelands and on uplands access. App. 37-40.[9] Finally, the Court of Appeals made it clear that the tribes are permitted a share only of those shellfish that would be present naturally on the commercial growers' beds absent the growers' efforts; the growers are entitled to the entire fruits of their labor and investment in their tidelands. App. 33-35. The court then remanded for a factual determination of what portion of each growers' beds are exempt from tribal harvest because they result from the growers' efforts. *Id.* The district court has referred remanded issues to another judge for mediation. CR 16608.

REASONS FOR DENYING THE PETITIONS

I. The Court of Appeals Created No Conflict by Refusing to Graft Species or Technology-Based Limitations Onto Express Treaty Language.

The State seeks certiorari on the question whether "there is a treaty right to take half of an off reservation natural resource, such as deep water shellfish, where Indians did not take that resource at treaty time." State Pet. i. The question rests on an incorrect factual premise, does not implicate any conflict in authority, and seeks a repudiation of the plain language of the treaties.

The treaties here reserve to the tribes the right of taking "fish," which, as the courts below noted, has "'perhaps the widest sweep of any word the drafters could have chosen.'" App. 18 (quoting App. 57). The tribes may exercise their fishing right "at all usual and accustomed grounds and stations," and those grounds and stations have already been adjudicated (in decisions which are long since final) to include significant expanses of deep water. App. 159. At treaty times the tribes took virtually every shellfish species imaginable, including species like geoduck, crab and urchins that today are found predominantly in deep water,[10] and they

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[9] While the tribes continue to believe that the restrictions are overly harsh, they have not sought certiorari.

[10] *See, e.g.*, SER 1026, 181, 213, 792-97, 1027, 1049, 1053-56, 1096 (archaeological and anthropological evidence that tribes took at least 114 species of shellfish, including cucumbers, urchins, scallops, crabs, octopus, and geoduck).

took those shellfish from deep and shallow water.[11] The factual premise of the State's question is therefore incorrect, and its resolution would not affect the ultimate outcome in this case.

Moreover, there is no definable "resource, such as deep water shellfish." The State's focus is on species of urchin, geoduck, crab, cucumber and shrimp. While these species might be termed "resources," it is highly inaccurate to imply that they are exclusively deep water ones. Through time, advances in technology have enabled both non-Indians and Indians alike to take those species more efficiently from deep waters, and documented overharvesting by non-Indians has reduced the abundance of those species in shallow waters. While the State denies it, State Pet. at 18 n.9, what it necessarily seeks is a ruling that the tribes should not be able to take advantage of technological advances to harvest shellfish from "deeper" waters within their usual and accustomed grounds and stations.[12]

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[11] *See, e.g.*, SER 281-82, 695, 790-97, 1049-56 (describing deep water shellfishing techniques including breath-hold diving, kelp-line sinking, spearing, and dip netting). The State's claim that the tribes did not take shellfish from deep water misstates this record, which includes testimony by the State's own experts and the contemporaneous observations of non-Indians, including George Gibbs. Indeed, in the one usual and accustomed area determination it had to make as part of this proceeding, the district court found that the Upper Skagit Tribe "took fish, including shellfish" from numerous marine areas that include deep as well as shallow water. App. 91-92. (The other respondent tribes have long had adjudicated fishing areas that encompass deep water.) That finding was not appealed.

[12] Although not clear, it is possible that the State is also attempting to resurrect an argument made below that the courts should define a separate set of fishing areas for each of the hundreds of species of fish that are part of the tribal fishing right. That issue is patently inappropriate for certiorari. The decision of the courts below to adhere to the plain language of the treaties and hold that each tribe has one set of usual and accustomed grounds and stations within which it may exercise its right of taking fish is not in conflict with any other decision. In fact, as the Ninth Circuit noted, courts in this litigation have always proceeded on the basis that each tribe's adjudicated usual and accustomed grounds and stations apply to all its fishing activity. App. 19-20. Moreover, the State's proposal to define hundreds of sets of fishing areas is judicially unworkable in the extreme. App. 20.

But whether the State is arguing for a technology-based or a species-based limitation on the tribes' express fishing right, the issue it raises is not worthy of certiorari. The Court of Appeals' holding is grounded in the plain language of the treaties. "With all deference to the State, there is no language in the Treaties to support its position: the Treaties make no mention of any species-specific or technology-based restrictions on the Tribes' rights." App. 18. While the State argues that the Court of Appeals' fidelity to the treaty language brought it into conflict with this Court's decisions in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), and *Fishing Vessel*, and with various other decisions, no court has ever adopted the State's position.

Seufert held that the Yakama Tribe had a right to take fish on the Oregon side of the Columbia River, even though that area was outside the Yakama Tribe's ceded territory, because tribal members had habitually fished there. 249 U.S. at 198-99. That the Court examined *where* tribal members had customarily fished is unremarkable, because the treaties restrict the tribes' fishing right to their "usual and accustomed" places. The Court nowhere suggested, however, that an implicit restriction should also be grafted onto the treaties limiting the tribes to their traditional fishing *methodology* or to *species* taken at treaty times. Indeed, in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), this Court rejected such a rewriting of the treaties:

> [T]he *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed" places *in the "usual and accustomed" manner*. But the treaty is silent as to the mode or modes of fishing that are guaranteed.

Id. at 398 (italics in original).

Nor does *Fishing Vessel* contain any intimation that the tribes are restricted to fishing methodologies used or species taken at treaty times. The State points to the statement that the treaty language "'securing' certain fishing rights . . . [is] synonymous with 'reserving' rights previously exercised," 443 U.S. at 678, but ignores the Court's very next words describing that previously exercised right as quite simply

"the [tribes'] right to meet their subsistence and commercial needs by taking fish from treaty area waters," *id.* at 679, not some circumscribed right of doing so only in a certain manner or only with respect to certain species.[13]

The State further alleges a conflict between the decision below and two district court decisions, *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin ("LCO")*, 653 F. Supp. 1420, 1426-29 (W.D. Wis. 1987). A conflict with a district court decision is not a basis for certiorari. Rule 10. Moreover, both *Michigan* and *LCO* are entirely consistent with the Court of Appeals' decision here. The court in *Michigan* looked to the tribes' historic practices only to determine that a fishing right should be *implied*. It then held that such a right cannot be limited to the species taken at treaty times or the methods then used:

> The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing

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[13] The State also alleges a conflict between the decision below and statements by the district court in the earlier phases of this litigation (including a finding quoted in *Fishing Vessel*, 443 U.S. at 667-68). Of course, even if there is such a conflict, it is not the stuff of certiorari. And there is not. Long ago, the district court concluded that "[t]he right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking." 384 F. Supp. at 401. It further found that "Indian fishing was not limited to any species. They took whatever species were available at the particular season and location." 384 F. Supp. at 352. The district court has never retreated from these findings and conclusions and they have been affirmed in all respects on appeal. 520 F.2d at 693.

The State claims that an interim procedural order, known as Paragraph G, 459 F. Supp. at 1037-38, requires the tribes to put on evidence of treaty time activity before being able to engage in that activity now. State Pet. 15. However, the language of the order is entirely permissive, and in entering it the district court did not purport to alter its substantive analysis of the treaties.

> techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.

471 F. Supp. at 260. The *LCO* court came to the same conclusion. 653 F. Supp. at 1430.[14]

Finally, the State alleges a conflict with two Court of Appeals' decisions. In *United States v. Dion*, 752 F.2d 1261 (CA8 1985) (*en banc*), *rev'd in part*, 476 U.S. 734 (1986), the court refused to *imply* a treaty right to sell eagles. That holding provides no support for rewriting express treaty language. *United States v. Top Sky*, 547 F.2d 486 (CA9 1976), is a previous decision of the Ninth Circuit and so cannot give rise to a circuit split. Moreover, the *Top Sky* court only held that a treaty right to hunt would not have been understood by the treating Indians to extend to the right of selling eagles because they deplored such a practice. *Id.* at 487-88. Here, the record contains no suggestion that the tribes understood their right of taking fish to be saddled with any technological or species-based limitations, and there is accordingly no tension between *Top Sky* and this case.[15]

The Court of Appeals' refusal to graft unstated restrictions onto express treaty language therefore is not in conflict with the decision of any court. Moreover, the holding is manifestly sound. It is faithful to the plain language of the treaties and a treaty record showing that neither the United States nor the Indians understood that the tribes' fishing rights would be limited to treaty time practices. The State has not presented a basis for certiorari.

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[14] The *LCO* court later concluded that a commercial lumbering right should not be *implied* in treaties that secured the right to hunt, fish and gather wild rice, because the tribes had not engaged in that activity at treaty times. 758 F. Supp. 1262, 1271 (W.D. Wis. 1991). Again, that holding suggests nothing about the contours of a right explicitly reserved.

[15] The State's own historian testified that no evidence exists of an intent to exclude any species from the tribes' fishing rights. SER 270-71.

II. Equal Sharing of The Fish Resource Is a "Matter Decided" and No Conflict Exists.

The State claims that the courts below erred in holding that the tribes are presumptively entitled to an equal share of a "resource, such as deep water shellfish, . . . where there was no historic dependence on that resource that would support an equitable allocation." State Pet. i. The State argues that the district court instead should have calculated the historic dependence of the tribes on each of the more than one hundred different species of shellfish (in fact, to be more precise, that the court should have evaluated the tribes' dependence on deepwater harvesting of each of those species), and then done a species-by-species allocation. The State's proposed factual tangle again rests on an incorrect premise and fails to implicate any conflict in authority. The approach taken by the courts below is fully consistent with this Court's precedent.

As a threshold matter, the State did not raise this issue in the district court. There it argued that the tribes' fifty percent share should be reduced because the tribes had attained a moderate living, but it never questioned the appropriateness of an equal share as the presumptive starting point in allocating the treaty right. The State first raised the issue in the Court of Appeals, and the tribes identified the State's failure to preserve the issue in their briefing to that court. Brief of Indian Tribes at 95. The Court of Appeals rejected the State's argument without addressing it, and it is inappropriate for review here. *City of Springfield v. Kibbe,* 480 U.S. 257, 259-60 (1987).

The State, moreover, continues to ignore the uncontroverted evidence that at treaty times the tribes relied upon significant harvests of the various species that the State characterizes as "deep water shellfish." *See supra* at 9-10 & nn.10, 11. The tribes have demonstrated a "historic dependence" on those species, and resolution of the question presented would therefore have no effect on the outcome below. If the State's real assertion, on the other hand, is that the tribal allocation should be reduced because those species are principally harvested in deep water today, then it is simply restating its technology argument and certiorari is inappropriate for the reasons outlined above.

Even if one overlooks the question's defects, the State's argument for certiorari does not hold up. The State does not allege a circuit split. It only claims that the courts below failed to follow the "analytical steps laid out in *Fishing Vessel*." State Pet. 19. But this is not so. The *Fishing Vessel* Court engaged in a three-step analysis of the tribes' right to an allocation. First, it found that the tribes are entitled to a division of fish. 443 U.S. at 678-79. Second, as to allocation it held that "an equitable measure of the common right should initially divide the harvestable portion . . . into approximately equal treaty and nontreaty shares." *Id.* at 685.[16] Third, it stated that the treaty share should be reduced "if tribal needs may be satisfied by a lesser amount." *Id.* "Thus, [u]pon proper submissions to the District Court . . . in response to changing circumstances," *id.* at 686-87, the tribal share can be modified.[17]

The district court conducted just that analysis. First, it concluded that shellfish are "fish" within the meaning of the treaty right, an issue no longer contested by any petitioner. ER 52-55; App. 56. The court then made an initial division of the resource into equal treaty and non-treaty shares. App. 84. It then examined whether any change in circumstances had occurred such that it should reduce the tribal share. Because "[t]he uncontroverted evidence presented at trial is that the Tribes lag significantly behind other residents of the State of Washington in their overall standard of living," App. 85, it declined to do so.[18]

The State argues that the district court instead should have performed a species-by-species allocation based solely

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[16] The Court explained that the logic of a presumptively equal share given the "in common with" language of the treaties "is manifest." *Id.* at 687 n.27. "Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset . . . ." *Id.*

[17] The Court provided examples of the kinds of changed circumstances it had in mind, such as a tribe dwindling "to just a few members," or "abandon[ing] its fisheries" after finding other sources of support. 443 U.S. at 687. No petition argues that either event has taken place.

[18] Only UPOW asks this Court to review the district court's determination regarding the tribes' current economic condition. UPOW Pet. 27-29. UPOW's factbound claim of error is an inappropriate candidate for certiorari.

on the tribes' historic use of different species. This is directly at odds with *Fishing Vessel*'s holding that the starting point in allocating a common right is an equal division of the resource. 443 U.S. at 685. Indeed, the district court has never examined the relative dependence of the tribes on each of the various species of finfish and the *Fishing Vessel* Court did not suggest that it should have. The Court did note the district court's equal allocation of those species to be consistent with other natural resource cases where, after implying a right to a resource based on historic usage, the courts have accorded tribes enough of the resource to ensure their reasonable livelihood. *Id.* at 685-86. But the Court never suggested that instead of starting with a presumptively equal allocation of an express common right a court should do a variegated species-by-species allocation analysis. Thus, there is no conflict between *Fishing Vessel* and the holding of the courts below. No court has ever interpreted *Fishing Vessel* as does the State, and the State has failed to present a basis for certiorari.

III. It Is a "Matter Decided" that the Stevens Treaties Provide a Right of Access to Private Property and Override the Presumption of the Equal Footing Doctrine, and No Conflict Exists.

Half of petitioners' questions go to the issue whether, even setting the shellfish proviso to the side, the tribes may exercise their right to take shellfish on privately owned tidelands.[19] This, however, is a matter long since decided. For more than ninety years this Court has held that the Stevens treaty right of taking fish includes the right of using private property, and that neither state-law principles nor the Equal Footing Doctrine can impair that right. In light of this settled law, petitioners' claims of conflict ring hollow.

A. Right of Access

UPOW and the Alexander petitioners present the broadest challenge, arguing that the treaty fishing right does not provide for a tribal right of access to privately owned tidelands to take shellfish. They argue that the Ninth Circuit's decision "is an unprecedented imposition of tribal usufructuary rights on private property." Alexander Pet. 12.

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[19] *See* State q.2; Alexander q.1; Growers q.2; UPOW qq.1, 3.

This is incorrect. No petitioner appealed the district court's decision that the treaty fishing right subsumes the right of taking shellfish, and *United States v. Winans*, 198 U.S. 371 (1905), squarely held that under the Stevens treaties the tribes may utilize private property to exercise that right:

> [T]he Indians were secured in [the] enjoyment [of their fishing right] by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for – in other words, the Indians were given a right in the land – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned.

Id. at 381. Fourteen years after *Winans*, in *Seufert*, this Court upheld the rights of the Yakama tribe, without regard to private land ownership, not only to take fish on the banks of the Columbia River but to build houses on those banks to dry and cure their fish. 249 U.S. at 197-99. And sixty years after that decision, in *Fishing Vessel*, this Court was unanimous in the view that the treaty right of taking fish includes the right of using private property for that purpose, with the dissent arguing that this was a core function of the treaties:

> As was made clear in *Winans*, the purpose of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds.

443 U.S. at 707; *see also id.* at 677 n.22. Thus, whereas petitioners criticize the Court of Appeals for "impos[ing] servitudes" on their lands, Alexander Pet. 10, this Court has long recognized that it is the Stevens treaties themselves that "impose[ ] a servitude upon every piece of land as though described therein." *Winans*, 198 U.S. at 381.

Petitioners seek to distinguish *Winans* on two grounds. First, they argue that the only private property the tribes can utilize are "well-established trail[s]" to which they have established a "prescriptive right" through decades of open and continuous use. Alexander Pet. at 15-16; UPOW Pet. at 16-17. However, *Winans* described the scope of the treaty

servitude in much broader terms, stating simply that the treaty "fixes in the land such easements as enables the right to be exercised," 198 U.S. at 384, which is consistent with the plain language of the treaties preserving to the tribes the right of access to "*all* usual and accustomed" fishing areas. Moreover, *Winans* flatly rejected the notion that under the treaties the tribes "acquired no rights but such as they would have without the treaty." 198 U.S. at 380. To limit the treaty servitude to nothing more than a prescriptive easement that any person could establish would be to turn *Winans* completely on its head. Finally, *Fishing Vessel* is directly to the contrary, interpreting *Winans* and *Seufert* to hold that the tribes have rights "beyond those which other citizens may enjoy," 443 U.S. at 681 (quotation omitted), including the right "to cross private lands," *Id.* at 676 n.22. Again, the dissent agreed, stating that "this right, described in *Winans* as a servitude or right over land not owned by the Indians, entitled the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area." *Id.* at 703.

Petitioners also argue that *Winans* does not apply because it involved migratory salmon rather than immobile shellfish, and a right of access is more necessary to ensure the tribes a fair share of the former. But *Winans* did not turn on the nature of the fish being taken. And petitioners' claim that tribes can more easily secure a fair share of shellfish than salmon without access to private property is both illogical and does not withstand even a superficial examination of the record, which indicates that the "vast majority" of tidelands in Washington State are now in private ownership, App. 73, including those tidelands most naturally productive of shellfish. SER 999-1002.[20]

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[20] Petitioners are also incorrect in arguing that shellfish fall outside *Winans* because they are part of the realty under state law. Shellfish are in fact personal property, *see Edison Oyster Co. v. Pioneer Oyster Co.*, 157 P.2d 302, 307 (Wash. 1945), but their precise state law status is immaterial. *Winans* rejected the notion that treaty rights can be impaired by state law, 198 U.S. at 379, a holding reaffirmed in *Fishing Vessel*, where this Court stated that non-Indians "may not rely on property law concepts" to defeat tribes' treaty fishing rights. 443 U.S. at 684.

The decisions below therefore adhered to nearly a century of precedent from this Court. Hence, petitioners can make only the weakest allegations of a conflict. They note that in *Antoine v. Washington*, 420 U.S. 194, 207-08 n.11 (1975), this Court did not reach the question of a tribe's hunting rights on private land under an 1891 agreement. But that obviously does not take away from what this Court did say in *Winans* and *Fishing Vessel* about fishing rights under the Stevens treaties.

By the same token, that the courts in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt ("LCO")*, 700 F.2d 341 (CA7 1983), and 760 F.2d 177 (CA7 1985), and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (CA8 1997), *cert. granted on other grounds*, 118 S. Ct. 2295 (1998), found that, under the treaties before them, the Chippewa tribes do not have a right to exercise their rights on private property, says nothing about the proper construction of the Stevens treaties. Those cases simply do not enunciate a general principle that all Indian treaties preclude tribal access to private property; they very clearly limit their holdings to the treaties considered there.[21]

Finally, UPOW's claim that the decision below conflicts with a line of Washington cases beginning with *Sequim Bay Canning Co. v. Bugge*, 94 P. 922 (Wash. 1908), is frivolous. UPOW Pet. 20. Those cases merely hold that, under state law, the owners of private tidelands may exclude others from harvesting clams from their tidelands. They do not address the effect of the Stevens treaties on this general rule.[22] Indeed, the only reported Washington decision to address the

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[21] The treaty language, and the courts' findings of fact about the tribes' expectations for using private property, differ considerably. Neither the *LCO* nor the *Mille Lacs* treaties provide the treating tribes with a right to exercise their usufructuary rights at "all usual and accustomed grounds and stations." *See LCO*, 700 F.2d at 345; *Mille Lacs*, 124 F.3d at 910. Indeed, in neither *LCO* nor *Mille Lacs* did the plaintiff tribes even claim a right of access to private property. 700 F.2d at 364 n.14; 952 F. Supp. at 1376; 861 F. Supp. at 789 n.2.

[22] Nor do these cases, or other twentieth-century cases cited by petitioners, *see, e.g., McKee v. Gratz*, 260 U.S. 127 (1922), have any bearing on the understanding of the treaty terms prevalent in the mid-nineteenth century.

tribes' shellfishing rights is fully consistent with the decision below. *See Washington v. Courville*, 676 P.2d 1011 (Wash. Ct. App. 1983) (holding that shellfish fall within the right of taking fish).

B. The Equal Footing Doctrine

Petitioners also argue that, even if the treaty right of taking fish includes an entitlement to enter private property to exercise the right, the entitlement implicitly was abrogated under the Equal Footing Doctrine upon the admission of the State of Washington into the Union. Petitioners' argument does not present a conflict of authority or any other basis for certiorari, because in *Winans* this Court squarely decided the point, holding that the United States intended the Stevens treaty fishing right to bind the future State and to override the presumption of the Equal Footing Doctrine. That holding is dispositive here.[23]

The United States has always possessed the power to make pre-statehood conveyances of title "whenever . . . necessary to do so in order to perform international obligations . . . or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). In *Winans*, this Court held that in the Stevens treaties the United States clearly intended to reserve to the tribes the ability to use private property to effectuate their fishing rights, and that an appropriate public purpose justified overcoming the equal footing presumption:

> The extinguishment of Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such

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[23] Petitioners scarcely mention this basis for the holding of the court below. They argue instead that two independent grounds proffered by the Court of Appeals (that the treaties here involve a reservation rather than a grant of rights, and that the tribes are not claiming fee simple ownership of the tidelands) are in conflict with decisions of this Court and other Courts of Appeals. However, there is no occasion to examine those alternative grounds, for they make no difference to the outcome of this case. *Winans* controls.

> a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

198 U.S. at 384. Ever since *Winans*, the federal courts (including in the decisions ultimately upheld in *Fishing Vessel, see* 384 F. Supp. at 401) have consistently held the Equal Footing Doctrine not to affect the scope of the tribes' fishing rights, and state court decisions relying on the doctrine to that end have consistently been reversed. *See, e.g., Washington v. Tulee*, 109 P.2d 280 (Wash. 1941), *rev'd*, 315 U.S. 681 (1942).

Petitioners weakly suggest that *Winans* is not binding because this case involves shellfish rather than salmon. But they do not contest that the right of taking shellfish is part of the broader right of taking fish, and *Winans'* holding that the United States overrode the equal footing presumption so that the tribes could exercise their fishing rights is therefore squarely applicable. *Winans* admits of no distinctions in this regard between different types of fisheries, and the facts do not either. As the district court found (and as petitioners' own experts testified), the taking of salmon includes the extensive use of tidelands for "beach seines, tidal impoundment traps, stake nets and reef nets." App. 83. *See also* 384 F. Supp. at 352, 360-61, 370, 378. Indeed, as the treaties expressly provide, the fishing right even includes the right to "erect[] temporary houses for the purpose of curing" fish. These aspects of salmon fishing affect use of tidelands in ways similar to the taking of shellfish, particularly given the stringent limitations imposed below on tribal shellfishing on private tidelands.[24] The effect of the Equal

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[24] To the extent petitioners are arguing that shellfishing can be exempted from the *Winans* holding because the proviso makes the shellfishing right temporary, they are forced to ignore the findings of the courts below that the United States intended to guarantee to the tribes, and the tribes understood they were reserving, a permanent right of access to their natural shellfish beds, App. 27-28, 69-70, and that the proviso only precludes the tribes from harvesting shellfish from artificial beds created by settlers. App. 26, 77-78. For the same reason, the asserted rule of *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (CA10 1995), that under the equal footing

Footing Doctrine on the scope of the tribes' shellfishing rights is thus a "matter decided," and presents no basis for a grant of certiorari.

IV. The Court of Appeals Created No Conflict in Its Interpretation of the Shellfish Proviso.

A. The Court of Appeals Correctly Reviewed the Proviso Meaning *De Novo* and Subsidiary Facts for Clear Error.

Petitioners argue that the Court of Appeals did not review *de novo* the district court's conclusions regarding the meaning of the treaty shellfishing proviso and that this purported error brought it into conflict with the decisions of other circuits and of this Court. The Court of Appeals, however, expressly stated that it was conducting *de novo* review, App. 16, and its opinion bears that statement out. The court's conclusion was "that the district court's reasoned analysis of the Proviso *is correct*," App. 26 (emphasis added), not just that the analysis was not clearly erroneous. In explaining its decision, moreover, the court emphasized several points, reasoning that petitioners' interpretations of the proviso are "totally inconsistent" with the repeated promises made by the United States' negotiators to preserve the tribes' access to their fisheries, App. 27, and that petitioners' expansive reading of the proviso is flatly at odds with the "black-letter canon[]" that textual provisos are to be strictly construed. App. 28. Analysis of this sort is the hallmark of *de novo* review, and the premise of petitioners' argument therefore does not hold up.[25]

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presumption temporary and precarious treaty rights might vanish upon statehood, has no applicability to this case, even setting aside *Winans'* holding that the United States overrode the presumption in the Stevens treaties. Thus the *Repsis* court itself distinguished the Stevens treaties because of *Winans'* description of the fishing right as permanent and binding on the State. 73 F.3d at 991.

[25] Other portions of the decision below confirm that the Court of Appeals engaged in *de novo* review of the meaning of the proviso. Thus, it showed no deference in reversing the district court on the question whether the protections afforded to "citizens" by the proviso extend to the State. App. 35-36.

Petitioners attack the Court of Appeals' determination that it should "review for clear error all of the district court's findings of historical fact, including its findings regarding the treaty negotiators' intentions, [and that it would] then review *de novo* whether the district court reached the proper conclusion as to the meaning of the Shellfish Proviso given those findings." App. 16. However, none of the decisions cited by petitioners contains any statement at odds with this description of the proper standard of review – indeed, not one even discusses the standard of review appropriate in considering a district court's subsidiary "findings of historical fact." There simply is no conflict between the Court of Appeals' statement of law on this point and that found in any other cited decision.

Nor is there any error in the Court of Appeals' approach. Petitioners mistakenly assume that whenever an appellate court reviews a legal conclusion *de novo*, it should also review *de novo* all component parts of that conclusion. This is incorrect. This Court has repeatedly noted that even if a trial court conclusion is appropriately classified as one of law, an appellate court should review for clear error any subsidiary findings of historical fact.

In *Ornelas v. United States*, 517 U.S. 690 (1996), for example, this Court held that "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal," but "hasten[ed] to point out that a reviewing court should take care . . . to review findings of historical fact only for clear error." *Id.* at 699. Similarly, in *Miller v. Fenton*, 474 U.S. 104 (1985), this Court held that while the voluntariness of a confession is a legal question subject to plenary federal review on habeas, "subsidiary factual questions, such as whether a drug has the properties of a truth serum or whether in fact the police engaged in the intimidation tactics alleged by the defendant, are entitled to [the presumption of correctness attaching to factual determinations]." *Id.* at 112 (citations omitted). Fed. R. Civ. P. 52(a) simply does not "exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). This is no less true where a factual finding serves as a predicate to a legal conclusion reviewed *de novo*.

The decision below was fully consistent with these principles. In the district court, petitioners raised a host of factual allegations regarding the knowledge and intentions of the individual treaty negotiators. They asserted, for example, that the American negotiators lacked knowledge of the shellfish industry and in drafting the proviso would have looked instead to other "frontier contexts" like mining or agriculture. App. 59. They further asserted that even if the negotiators had known about the shellfishing industry, they would have distinguished between the east and west coast industries, and that there were no uniform industry practices regarding the staking or cultivating of beds. *See, e.g.*, Growers Pet. 5, 8. They likewise asserted that the Indian negotiators had no knowledge of shellfishing industry practices, uniform or not. *Id.* at 7. These were factual allegations, and after a three-week trial the district court rejected them all on the basis of "compelling and persuasive" evidence to the contrary. App. 55. In reviewing those claims on appeal, it was entirely appropriate for the Court of Appeals to show deference to the district court's findings of fact regarding them. Rule 52(a) dictated that it do no less.

Employing a deferential standard of review with respect to subsidiary factual findings is also fully consistent with this Court's decisions. Contrary to petitioners' repeated claims, for example, this Court in *Fishing Vessel* did not engage in a plenary review of disputed facts as to the knowledge and intentions of the Stevens treaty negotiators. Rather, it cited extensively to the district court's findings on those points and conducted its treaty interpretation on the basis of those findings. *See, e.g.*, 443 U.S. at 664-69, 676-77 (citing to the district court's findings for the proposition that "[c]ontemporaneous documents make it clear that [the negotiators] *recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries*" (emphasis added)).[26]

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[26] The Alexander petitioners cite to three other decisions of this Court, Alexander Pet. 27, but again there is no tension with the decision below. None of those decisions contains any standard of review discussion. Nor do there appear to have been any disputed issues of historical fact on which the lower courts had been required to make findings.

The Growers, meanwhile, cite to four court of appeals decisions to allege a conflict. In none of those cases, however, had the respective district courts resolved any disputed issues of historical fact, so these decisions provide no guidance as to the standard of review that the circuits would employ in such a situation.[27] Moreover, highly analogous cases from those circuits demonstrate that they would take the same approach as did the court below. Thus, while petitioners insist that treaties are just like statutes, they are in fact a combination of contract and statute, and both contractual and statutory principles of interpretation are applied to them.[28] *See O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Fishing Vessel*, 443 U.S. at 675.

The universal rule with respect to contracts is that, where there are disputed issues of historical fact pertinent to determining the intent of the contracting parties, the trial court's resolution of those issues is reviewed for clear error. *See, e.g., National Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 989 (CA5 1990) ("[I]f the interpretation of the contract turns on the consideration of extrinsic evidence, *such as evidence of the intent of the parties*, the standard of review is clearly erroneous." (emphasis added)); *Scarborough v. Ridgeway*, 726 F.2d 132, 135 (CA4 1984) ("There are factual questions involving the interpretation of an agreement to which the not-clearly erroneous standard applies such as the intent of the parties in employing ambiguous language where the oral and documentary

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[27] Two of the cases involved appeals from summary judgment motions. *Rainbow Navigation, Inc., v. Department of Navy*, 911 F.2d 797, 800 (CADC 1990); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1138 (CA3 1988). The other two involved appeals from motions to quash service of process where there were no factual issues relating to treaty interpretation presented. *Tabion v. Mufti*, 73 F.3d 535, 537 (CA4 1996); *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 636-37 (CA5 1994). While the courts of appeals in several of the cases engaged in some discussion of the treaty negotiating records, there does not appear to have been any dispute as to the contents of those records.

[28] Interpreting a treaty just like a statute would not change the outcome in any event. Where there is a factual controversy as to a legislature's intent the rule remains the same: the district court's conclusion on the subject is a factual determination subject to review for clear error. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

evidence is conflicting."); *Washington Hosp. v. White*, 889 F.2d 1294 (CA3 1989) (same); *North Cent. Airlines, Inc. v. Continental Oil Co.*, 574 F.2d 582, 586-87 (CADC 1978) (same). The Ninth Circuit decision honored that rule here, and there is no conflict on which to base a grant of certiorari.

The Growers complain that deferring to subsidiary factual findings puts an appellate court in the position of automatically deferring on the ultimate issue of treaty meaning. This is not so. The Growers confuse a district court's findings regarding the treaty *negotiators'* knowledge and desires with the ultimate question of the *United States'* and the *tribes'* intent. In some cases the evidence regarding the former might be equivocal, and where the district court might draw one conclusion from that indeterminacy, an appellate court might as a legal matter draw another. In other cases, however, the findings might be so strong as to point reasonably only in one direction. This is such a case.

The district court found that the American treaty negotiators were familiar with the terms and practices of the shellfish industry as they prevailed on both the east coast and in the Washington Territory (indeed, George Gibbs' writings explicitly equate the two). App. 64-66, 71. It further found that the treating Indians had knowledge of those terms and practices by virtue of their exposure to them at Shoalwater Bay. App. 65-66. And it found that the choice of the term "beds staked or cultivated" in the shellfish proviso was no accident, but that "staked" and "cultivated" beds were widely understood to refer to beds of shellfish created by citizens where natural shellfish beds of that type did not exist. App. 77-78. These findings do strongly suggest the conclusion that the treaty prohibits tribal shellfishing only from artificial beds, but that the evidence here is so strong does not mean that a less deferential standard of review should be employed, any more than a different standard of review would be called for where a trial court determines that a confession was involuntary based on factual findings that a defendant had been tortured before confessing.

To the contrary, the weight of the evidence provides yet another reason for denying certiorari. The district court repeatedly described the proof in support of the tribes' interpretation of the proviso as "compelling and persuasive," App. 55, and the Court of Appeals was clearly of the same

view. App. 26. A ruling that the court below should engage in a plenary review of all factual matters would be highly unlikely to have any effect on the ultimate outcome.

B. The Proviso Meaning is a Unique, Factbound Issue Which the Courts Below Decided Correctly.

Petitioners argue to varying degrees that this Court should review the merits of the holdings below that the shellfish proviso prohibits tribal harvesting only from artificial shellfish beds. But that determination gives rise to no conflict and will have no impact beyond this case. There are no other Indian treaties containing language about shellfish beds.

The interpretation of the proviso language, moreover, is a heavily record-based inquiry. To reach their conclusions, the courts below engaged in a searching and detailed analysis of how the words of the proviso were understood and used at treaty times and how the parties acted subsequent to the treaties. They examined sources including industry treatises, newspaper and magazine articles, court decisions, legislation, the letters and journals of oystermen, the treaty records, and the writings of the treaty negotiators themselves, all of which consistently distinguished staked or cultivated from natural beds of shellfish, and they considered substantial expert testimony on the subject.

In short, the lower courts did as this Court instructed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and interpreted the treaty language "in light of the common notions of the day and the assumptions of those who drafted [it]." *Id.* at 206. They addressed the arguments raised by petitioners here, finding them insufficient to overcome the "compelling" App. 55, 59, and "overwhelming[]" evidence in support of the tribes' interpretation of the proviso. App. 78.[29] Petitioners' requests that this Court engage in the same

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[29] Petitioner's claims of error do not withstand even the slightest scrutiny. For example, they claim that the courts below should have limited their analysis to dictionary definitions, even though treaty-time dictionaries do not define staked or cultivated shellfish beds, and even though their own expert conceded that the negotiators drew the proviso's terms from the shellfish industry. App. 26; D-467 at 108. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 537 (1991) (unanimous) ("dictionary definitions may be too general for purposes of treaty

heavily record-based and factbound inquiry already conducted by the two courts below betray a fundamental misunderstanding of this Court's role and do not present a basis for certiorari.

V. This Case Presents No Opportunity To Revisit Well-Settled Law Regarding Laches.

Following an unbroken line of precedent, the courts below held that the doctrine of "laches or estoppel is not available to defeat Indian treaty rights" in a case such as this. App. 28 (quoting *Swim v. Bergland*, 696 F.2d 712, 718 (CA9 1983), and citing *Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939)). The Growers and the property owners challenge this holding (the State does not raise the argument), but allege no circuit split. Certiorari should be denied on this basis alone.

Pointing to the dissent in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Growers claim that uncertainty exists as to whether a tribe, proceeding *by itself*, may be subject to the bar of laches. Not only has the alleged uncertainty failed to create any circuit split, but in this case the United States has sued along with the tribes for vindication of the tribes' treaty rights. It is clear beyond cavil (and petitioners make no claim to the contrary) that the

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interpretation"). They argue that the proviso prohibits tribal harvesting from "any beds," as if the overwhelming evidence as to the meaning of the "staked or cultivated" modifier does not matter. They claim that the courts below relied on a technical interpretation of east coast shellfish law, when those courts canvassed a wide variety of non-technical materials showing that the American public in general, and the treaty negotiators in particular, were familiar with the terms and practices of the shellfish industry, and that the treating Indians understood those practices by virtue of their exposure to them at Shoalwater Bay. App. 26, 59-78. They argue that the courts should have deferred to a 1905 letter from the Commissioner of Indian Affairs, even though that letter does not discuss the proviso, had its reasoning rejected by *Winans* 45 days after it was written, and is in conflict with a Commissioner's opinion written closer in time to the treaties. ER 1161-63; App. 76-77. Finally, they argue that the holdings below render the proviso duplicative of the treaties' "usual and accustomed" limitation, when in fact the tribes' usual and accustomed grounds and stations are broad areas within which there exist many locations containing only artificial shellfish beds, which the tribes could harvest were it not for the proviso.

doctrine of laches does not apply to the United States acting in its capacity as trustee for the tribes. *Nevada v. United States*, 463 U.S. 110, 141-42 (1983); *Board of County Comm'rs*, 308 U.S. at 351; *United States v. Minnesota*, 270 U.S. 181, 196 (1926); *cf. United States v. California* 507 U.S. 746, 757 (1993). The position advocated by the Growers therefore has no relevance to the outcome of this case. The writ should be denied.

VI. Petitioners' Overstated Claims of Hardship Do Not Support a Rewriting of the Treaties.

Throughout their arguments, petitioners claim that the decisions of the courts below are highly unfair and will wield a devastating impact on them. While clearly designed to engender sympathy, these claims are both factually overblown and an inappropriate basis for certiorari.

First, it is impossible to square petitioners' claims of hardship with the holdings below. Thus, while the Alexander and UPOW petitioners allege that unfettered tribal access to their properties will cause them great inconvenience and emotional harm, they nowhere acknowledge the stringent limitations that the courts below imposed on such access in response to their concerns. The tribes may harvest shellfish from private tidelands only five days out of every year (with slight increases for large properties), and they may do so only after having given the owner at least a month's notice and after having conducted expensive surveys definitively quantifying the natural shellfish presence on those tidelands. App. 37-40, 126-27, 146. As a practical matter, then, the tribes who could once resort to their fisheries at will may now do so only under the most restrictive of conditions.

The Growers, meanwhile, complain that the decisions below will rob them of the "fruits of their labor." This is pure hyperbole. Under the Court of Appeals' decision the growers will never lose a single clam or oyster produced by dint of their effort or investment. The holding below unequivocally limits the tribes only to a share of those shellfish that would naturally exist without the growers' labor. App. 33-35.

The impact on the growers from having to share nature's shellfish has not been finally determined, as the Ninth

Circuit remanded to the district court the question of the natural productivity of the growers' beds. The tribes have already conceded, however, that virtually all of the growers' oyster and mussel beds are artificial, App. 106, exempting approximately 66% of the total value of the shellfish commercially harvested from Washington tidelands from any tribal share. PL-988, Tbl. 50. The remaining 34% of the commercial harvest is largely in the form of clams, and here again it is clear that much of the growers' production results from their efforts. The total tribal share of the natural production will therefore likely be very small compared to the growers' overall harvest.

Petitioners, of course, make no mention of the hardship and poverty suffered by the tribes because of years of exclusion from their fisheries. Even more fundamentally, petitioners' allegations of harm cannot serve as a basis for interpreting what the treaties mean. It is a cardinal rule that "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). *See also Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). This rule is often applied to the detriment of Indian tribes; it applies with equal force when non-Indians seek to rewrite treaty terms to avoid a claimed injustice. This Court is simply not in the business of recrafting treaty promises that only Congress may amend, and petitioners' overstated claims of harm therefore do not create a basis for certiorari.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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